

NON-CHARTER MUNICIPALITIES: LOCAL SELF-GOVERNMENT

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In adopting article XVIII of the Constitution of Ohio the people made a dramatic and drastic revision of municipal law. This article deals with the main lines of development in general municipal power of non-charter municipalities to enact non-regulatory laws (sale of property, civil service, etc.). Specific powers, such as utilities and taxation, are covered elsewhere in this symposium. This discussion will concentrate on the judicial interpretation of section 2, 3 and 7 of article XVIII as they relate to non-charter municipalities.

The division of legal and political power between a central government and its local units has been a vexatious problem plaguing all ages and every society. The problem consists of obtaining a balance between conflicting political interests and administrative methods. Chief Justice Carl V. Weygandt has observed that Ohio's constitutional provisions for the division of power "have been highly and often bitterly controversial even from the time they were first proposed." He went on to state:

Hence, it is not surprising, either, that with the changing personnel of the court during the 44 years these provisions have been in effect, it has been no easy task to maintain something even remotely resembling consistency. . . .¹

This latter statement and particularly its indubitable accuracy should give any lawyer, or non-lawyer, considerable cause for reflection. That any system for the division of governmental power should be controversial is quite natural. But to find that after numerous cases over 47 years there is little which even remotely resembles consistency is a severe condemnation of either the constitutional provisions, or the court's interpretation of those provisions, or both.

PRE-1912

American common law generally relegated municipalities to the position of an arm or agency of state government—a creature of the legislature. Accordingly, they possessed only delegated powers and these were to be strictly construed. Judge Dillon's attempted thumbnail definition of municipal power is the most oft-quoted statement in municipal law:

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¹ State *ex rel.* Lynch v. Cleveland, 164 Ohio St. 437, 132 N.E.2d 118 (1956).

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in the express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.²

Whether Judge Dillon's statement is sufficiently accurate or comprehensive enough to be relied upon is not important here. It does portray the position of Ohio common law.³

The irresponsible and abusive use of power by state legislatures under the common law concept has been forgotten today. But it is well documented.⁴

The first major step in Ohio to curb the state legislature's abuse was a prohibition against special laws in the constitution of 1851.⁵ However, by the use of the device of classification the state legislature managed to wholly evade that restriction. Abuses again grew. Finally, in 1902 the supreme court declared invalid the entire classification structure of Ohio municipal law.⁶ The resulting crisis led to the adoption of the Municipal Code of 1902 in a special session of the legislature. This Code remains as the basic *statutory* law of Ohio.

In the period from 1851 to 1912 the worst aspect of state supremacy was not positive abuse of power but the irresponsible failure to enact desperately needed reforms. Considering that problem in broad outline, there are 3 major ways of attacking it by a constitutional division of powers:

1. Simply reverse the common law concept, *i. e.*, instead of municipalities having only those powers granted by statute, give municipalities very broad power to act by constitutional grant but allow the legislature to limit or prohibit municipal powers by statute.

² Dillon, 1 Mun. Corp. § 237 (5th ed.).

³ See *Benjamin v. Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957); *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913).

⁴ Fordham, *Local Government Law* 12 (1949); Mallison, "General versus Special Statutes in Ohio," 11 Ohio St. L.J. 462 (1950); Walker, "Municipal Government in Ohio Before 1912," 9 Ohio St. L.J. 1 (1948).

⁵ The principle Constitutional Provision is art. II, § 26. Other provisions also bear on the requirement of "uniform" or "general" laws. See Mallison, *supra* note 4.

⁶ *State ex rel. Attorney-General v. Beacom*, 66 Ohio St. 491, 64 N.E. 427 (1902); *State ex rel. Knisely v. Jones*, 66 Ohio St. 453, 64 N.E. 424 (1902).

An immediate subsidiary problem would be to decide what legislative action is to be considered as limiting municipal power. A liberal approach using statutory interpretation to draw broad implications, creation of preemption concepts, *etc.*, could easily put the situation back very close to the legislative supremacy of common law. A strict approach requiring specific positive statutory provision would have great legal and political significance. Politically, it is much easier to block restrictive legislation than it is to obtain enactment of broadening legislation. This is especially true if, as in Ohio, municipal representation in the legislature is substantial. Legally, municipalities could obtain wide freedom from reliance on statutory law. Municipal action would require only a proper public purpose and *lack* of restrictive statutes.

The primary responsibility for determining the division and scope of specific power would rest with the state legislature and political processes.⁷

2. Distribute governmental power by constitutional provision between the legislature and the local units.

Two subsidiary problems immediately arise. Is the separation to be absolute so that each has exclusive jurisdiction over its fields and the other has no power to act; or is each to be supreme in its field so that one can act where the other has not? How are the respective fields of power to be defined—by specific enumeration or by general guides, such as "municipal affairs," "local self government" or "state-wide concern"?

This general approach would obviously have a drastic impact. Within the sweep of their power, municipalities would have complete protection from legislative indifference and abuse. On the other hand, the state legislature would lack power to act and could not gain any such power except by a change in the constitution. Further, if the *state* is deprived of any ability to control municipal action, some device is needed to allow the *inhabitants* of the municipality to place limits on their own officials. One such device is to allow

⁷ A corollary of the common law concept of municipal power was the doctrine of delegation of legislative power. As creatures of the state legislature having only such powers as were granted by statute, municipal law also had to struggle with concepts of limitations on the ability of the state legislature to delegate its powers. The device of "statutory home-rule" is a constitutional enabling provision which permits the state legislature to delegate broad law-making power to municipalities. This approach does not, of course, solve the problem of getting the power to the municipalities. If statutes are passed which do grant broad powers, the end result can be very close to the effect of a constitutional reversal of the common law concept. The system is used in many States with varying degrees of success.

the local adoption of municipal charters which would operate as a local constitution.

Finally, there is the question of what municipalities are to have these powers, *i. e.*, are the constitutional grants to be self-executing or to require local action. If self-executing, each municipality, whether charter or non-charter, small village or large city, becomes a state legislature in miniature—within, of course, the powers granted. Substantial arguments can be made that many small municipalities are not prepared to assume complete responsibility for guiding their own affairs—especially not prepared to draft and adopt their own local constitution.

Defining the powers granted is a far more important problem in a distribution approach than in the case of a mere reversal of the common law concept. The respective interests and needs of the state and municipality change with time and, inherently, they overlap. Since the division is by constitutional provision any mistake⁸ is set in “concrete” and it would require a change in the constitution to rectify it.⁹ The “mistake” could be made originally in the distribution of powers or it could become a mistake through changes in the social conditions. Specific enumeration of powers is obviously difficult—in fact, impossible in the sense that at some point general categories would have to be made.¹⁰

Under this approach, the scope of municipal power is largely a matter of constitutional interpretation. The primary responsibility for determining the division and scope of municipal power would rest upon the state courts. The broader the categories of powers stated, the heavier the courts’ responsibility becomes. The serious question must then arise whether the courts are institutionally *capable* of doing an adequate job of dividing legislative power between the state and its municipalities.

3. The third approach is a combination of constitutional municipal power with legislative supremacy, and of a separation of powers. The variations possible are as innumerable as the breakdown of specific powers.

Article XVIII of the Ohio Constitution, as interpreted by the Ohio courts, uses the compromise approach. For example, power over municipal utilities is for the most part granted exclusively to

⁸ In the division of governmental power, opinions will always vary on whether any particular result is a “mistake.”

⁹ As used here, “change” means either constitutional amendment or a re-interpretation, including overruling of earlier decisions.

¹⁰ Compare the American Municipal Association model constitutional provision for home-rule.

municipalities.¹¹ On the other hand, taxing powers are granted to municipalities but are specifically subject to legislative control.¹²

The basic municipal power provisions are found in section 2, 3 and 7. The language used in these sections is general enough (or confusing enough) to enable reasonable men to disagree violently on which of the two basic approaches was intended. Even assuming a choice is made on which approach was intended, the language is general enough (or confusing enough) to permit reasonable disagreement on each of the important subsidiary questions.¹³

"ALL POWERS OF LOCAL SELF-GOVERNMENT"

The key provision of article XVIII is section 3. To facilitate analysis and discussion it can be broken into three parts:

(Clause 1) "Municipalities shall have authority to exercise all powers of local self-government"

(Clause 2) "and to adopt and enforce within their limits such local police, sanitary and other similar regulations,"

(Clause 3) "as are not in conflict with general laws."

The first major issue in interpreting section 3 is the question of the application of the "conflict" clause. Does it modify only the grant of police powers or does it qualify the entire grant, *i.e.*, powers of "local self-government" and "police" powers?

Almost immediately after the adoption of article XVIII the court gave what appeared to be a firm answer to that question. In *Fitzgerald v. Cleveland*¹⁴ the specific question was the power of Cleveland to establish a mode of selecting candidates for municipal office that differed from that prescribed by statute. Three judges specifically discussed the interpretation of section 3 and concluded that the "conflict" clause applied only to the police powers (clause 2) and did not modify the grant of "all powers of local self government" (clause 1). The three dissenting judges concurred in that interpretation of section 3 but argued that the particular matter in question (mode of selecting candidates) was controlled by a specific constitutional provision in article V, section 7 of the constitution.¹⁵

¹¹ The interpretation of the municipal utility provisions of art. XVIII is dealt with in another article in this issue.

¹² Art. XVIII, § 13. The interpretation of § 13 is dealt with in another article in this issue.

¹³ Not only does the literal wording of art. XVIII fail to differentiate the approach intended, but the journal of the Constitutional Convention of 1912 does not provide clear guidance. However, the Ohio Supreme Court has seldom bothered to refer to the journal for help. For example *State ex rel. Petit v. Wagner*, 170 Ohio St. 297, 164 N.E.2d 574 (1960) interpreting §§ 2, 3 and 7.

¹⁴ 88 Ohio St. 338, 103 N.E. 512 (1913).

¹⁵ Even though the powers of "local self-government" are not controlled by the

Dean Fordham has shown that there is reasonable grounds to believe that the court's interpretation of section 3 is wrong.¹⁶ However, on that point, the court has in case after case re-asserted the basic proposition that clause 1 is not limited by the conflict clause.¹⁷

A second foundation stone must be laid. Section 3 confers powers on "municipalities." Do *all* municipalities possess these powers of local self-government? First, nothing in article XVIII allows a group of people to incorporate themselves. Under section 1, municipal corporations are classified as cities and villages. Section 2 provides: "General laws shall be passed for the incorporation and government of cities and villages." Thus, a municipality is brought into being under "general," *i.e.*, statutory law. A municipality therefore starts with the form of government prescribed by statute. Its structure of organization and the allocation of powers between the offices is established by statute. Next, section 2 permits the passage of "additional" laws which become effective upon local acceptance by a vote. In Revised Code Chapter 705, the General Assembly established three additional forms of government which may be adopted by a vote subsequent to incorporation. This is generally referred to as the "local option law." Finally, section 7 provides:

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local-self government.

Under this provision any existing municipality clearly has the power through charter adoption to provide its own individual form of government. It can create such offices, and allocate municipal power

conflict clause, municipalities are subject to general constitutional safeguards, (due process, etc.) and to other specific provisions, such as the art. XII ad valorem property tax limitations. The problem in *Fitzgerald* thus became one of deciding if art. V, § 7 was a specific provision giving the state control of municipal candidate selections, or whether municipalities could control the matter as a power of local self-government under art. XVIII, § 3.

¹⁶ Fordham and Asher, "Home Rule Power," 9 Ohio St. L.J. 18 (1948).

¹⁷ The most recent re-affirmations are *State ex rel. Petit v. Wagner*, 170 Ohio St. 297, 132 N.E.2d 118 (1960); *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958); *State ex rel. Lynch v. Cleveland*, 164 Ohio St. 437, 132 N.E.2d 118 (1956). The *practical* significance of the resulting municipal supremacy depends on what powers the court considers "local" and upon how broadly or narrowly it defines "police" regulations. By its manipulations of those definitions, the court can make the *Fitzgerald* doctrine of great significance, or render it almost meaningless. Compare for example, *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 110 N.E.2d 778 (1953) dealing with slum clearance, and *Hagerman v. Dayton*, 147 Ohio St. 313, 71 N.E.2d 246 (1947), dealing with the meaning of "police" regulations. The *Fitzgerald* doctrine presents another subsidiary question. What other provisions of the constitution limit these clause 1 powers? This question is discussed *infra*.

to those offices, as its people deem best.¹⁸ For example, and not as a suggestion, all legislative power need not be vested in a council. Some might be placed in another office or body, such as the control of parks, *etc.* The number of executive offices could be narrowed or extended from those provided by statute.¹⁹

The existence of section 7 and particularly the peculiar wording of the last portion raises a question of whether section 3 is to be taken literally or whether the powers granted by section 3 come into play only if a charter is adopted. Are the powers of local self government available to all municipalities or is charter adoption a prerequisite?

Again, a definitive answer appears to have been given almost immediately. In *State ex rel. Toledo v. Lynch*²⁰ the non-charter city of Toledo appropriated money for a theater. Two questions were argued to and discussed by the Court: could a non-charter city exer-

¹⁸ Three of the principle cases on the § 7 power to establish a form of government are: *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203, 80 N.E.2d 769 (1948); *Frankenstein v. Hillenbrand*, 100 Ohio St. 339, 126 N.E. 309 (1919); *State ex rel. Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1913).

¹⁹ Occasionally the courts have lost sight of the operation of § 7 as empowering a municipality to determine its own governmental structure and allocate the rights and duties as it deems best. In *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 53 N.E.2d 501 (1944), the Charter provided that the *city manager* should hear cases relating to the suspension of patrolmen. Gen. Code § 4367 (now Rev. Code § 737.01) states "there shall be a department of public safety, which shall be administered by a director of public safety." Gen. Code § 4380 (now Rev. Code § 737.12) put the hearing power in the *director*. The court held the Charter provision void. It relied on a dual argument: that the operation of a police department was a non-local matter, or one of "state-wide concern"; and apparently that all matters touching a police department were a "police regulation" and subject to the conflict clause of § 3. The decision and syllabus 4, 5 and 6 were over-ruled in *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958), in which the matter was held to be neither a matter of "state-wide concern" nor a "police regulation."

The interesting point is that the allocation of power to the city manager would seem clearly a matter of the form of "government" controlled by §§ 2 and 7. Yet the *Sherrill* case never discussed that point, nor did *Canada* do so in over-ruling *Sherrill*.

The absurdity of the *Sherrill* oversight became apparent in *Sullivan v. Civil Service Commission*, 102 Ohio App. 269, 131 N.E.2d 611 (1956). The Euclid Charter did not provide for any safety director. The ludicrous result was a holding that no patrolman could be disciplined because no one had the power to hear charges!

The proper analysis of both *Sherrill* and *Sullivan* would seem to be that regardless of whether limitations on the grounds for discipline are "police regulations" or not, the *person who exercises the power* is controlled by the structure of government. The statutes apply to non-charter municipalities because of § 2 of art. XVIII. But the statutes are *superceded* by a charter adopted under § 7.

This analysis was adopted in *Harsney v. Allen*, 160 Ohio St. 36, 113 N.E.2d 86 (1953), but the court in *Sullivan* was apparently unaware of it. Thus *Sullivan* was wrong to start with, and in any event, is over-ruled by implication under *Canada*.

²⁰ 88 Ohio St. 71, 102 N.E. 670 (1913).

cise the "powers of local self-government" and was a theater a proper public purpose? Four judges specifically said no to both questions. One judge vehemently said Toledo did have powers of local self-government but that a theater was not a public purpose. One judge with equal vehemence said Toledo had the power and that a theater was a public purpose.

The majority of four presented the plausible argument that while section 3 granted powers to "municipalities" yet council and the mayor are not the municipality. Under this view, the people are the municipality and a charter was the means or device for the people to delegate their powers to the officials. Therefore, a charter was a prerequisite to the exercise of section 3.

The other two judges made at least as plausible an argument. Under their view section 3 granted general municipal powers and granted it to "municipalities." Section 7 gave the further right to establish a form of government, *i.e.*, the form of government was established by statute under section 2 and by section 7 a municipality could adopt its own form. It is significant to note that both judges specifically pointed to the "subject to" clause of section 7 as a reason why a charter was not necessary.

The position of the majority did not last. Ten years later the court decided *Village of Perrysburg v. Ridgway*.²¹ Perrysburg, a non-charter municipality, adopted an ordinance prohibiting the pickup or discharge of passengers by buses. Judge Wanamaker who had dissented in *Toledo v. Lynch* picked up three other judges and the majority flatly held that the non-charter village could validly adopt the ordinance by virtue of section 3. The syllabus specifically overruled *Lynch* on the proposition that a charter was a prerequisite to section 3 powers.

The syllabus and opinion by Wanamaker simply relies on "local self-government." No mention is made of whether the power came from section 3, clause 1 or clause 2 (police regulations). The significance would lie in the operation of clause 3 (the conflict clause). If the ordinance was a police regulation, its validity would also involve the question of conflict. However, the plaintiff did not argue that the ordinance conflicted with any statute—merely that the village lacked power. Two of the four judges concurred specially reserving the question of the effect of the State asserting "jurisdiction" over streets. The regulation of private buses would seem obviously to be a "police regulation."²² The concurring opinion seems quite clearly

²¹ 108 Ohio St. 245, 140 N.E. 595 (1923).

²² The grant of power to adopt "local police" regulations is one of the powers of "local self-government." The conflict clause is simply a specific constitutional limitation

to be reserving the question of a possible "conflict" with state statutes. Three judges dissented on the ground that the ordinance was not a "local regulation." Under this view, as the dissent commented, it is unnecessary to consider whether the municipality had power under section 3.

On the very same day the court also decided *Village of Struthers v. Sokol*, and *Youngstown v. Sandela*.²³ While the report does not so state, both Struthers and Youngstown were non-charter municipalities.²⁴ Each had a liquor ordinance which differed from the state liquor laws. In a unanimous opinion the court upheld the power to adopt the ordinances under section 3 and further held that the ordinances did not conflict with state statutes.

It is thus apparent that at that time all seven members of the court concurred that all municipalities, charter and non-charter, possessed and could exercise the powers granted by section 3 and that only local police and similar regulations were subject to the conflict limitation.

From 1923 to 1953 the *Perrysburg* doctrine was reiterated time and again without modification. Numerous cases upheld local police regulations of both charter and non-charter municipalities where no conflict existed with state statutes. There were also cases following the *Fitzgerald* doctrine, and upholding the exercise of non-police powers derived from clause 1 of section 3 even though a conflict with state statutes existed. However, there a factual distinction must be noted. In holding statutes void on the ground of a violation of clause 1 powers, the supreme court cases invariably involved charter municipalities. Of course, under *Perrysburg* the fact that a charter had been adopted would be totally irrelevant. On the *Perrysburg* theory, municipal power was derived from section 3, not the charter. The statements of the supreme court clearly reflected an acceptance of non-charter municipalities' powers.²⁵

Two lower-court cases involved non-charter municipalities. In

on that particular power just as § 13 is a specific limit on the "local self-government" power to tax. See *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958). Since no "conflict" was claimed, the majority opinion simply upholds the ordinance without specifying whether reliance was placed on clause 1 or clause 2 of § 3.

²³ 108 Ohio St. 263, 140 N.E. 519 (1923).

²⁴ Struthers has never adopted a charter. Youngstown adopted a charter late in 1923, but it was not effective until January 1, 1924. The *Perrysburg*, *Struthers* and *Youngstown* cases were all decided June 19, 1923.

²⁵ See for example syllabus 1, 2 and 3 of *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 53 N.E.2d 501 (1944). It should be noted that these portions of the syllabus were not over-ruled by *Canada*.

*Mansfield v. Endly*²⁶ the court upheld a non-charter city ordinance establishing salaries of councilmen and declared a statute void. However, the supreme court affirmance was on a somewhat different ground.²⁷

In *Hugger v. Ironton*²⁸ the city sold land to the Federal Government without advertisement for bids. The ordinance directly conflicted with General Code Section 3699 and Ironton was a non-charter city. The appellate court held: first, that the sale of real estate is not a police regulation and therefore not subject to the limitation of the conflict clause of section 3; second, that it was a local matter and therefore a power of local self-government; and third, that the statute was void and that under clause 1 the city could "dispose of the real property in question in the manner and by the procedure followed."

In considering *Hugger*, it should be noted that the court found that Ironton had power to sell real estate and that in the absence of a charter provision which adopted state law, Ironton could exercise that power by passing an ordinance, *i.e.*, taking legislative action. The court specifically found that both the abstract power and the ability to exercise it were granted by section 3.

In view of the pronouncements of the supreme court, the *Hugger* decision was the only logically consistent result possible. A non-police power of local self-government is, under *Fitzgerald*, not subject to the conflict clause and, under *Perrysburg*, Ironton had that power. Therefore, the statute was void as an unconstitutional limitation on "local self-government."

In *Babin v. Ashland*,²⁹ the supreme court specifically held the sale of real estate to be a power of local self-government. Ashland was a charter city. However, Judge Taft relied upon both the appellate court decision and the dismissal of the appeal in *Hugger*.³⁰

²⁶ 38 Ohio App. 528, 176 N.E. 462; *aff'd* 124 Ohio St. 652, 181 N.E. 886 (1931).

²⁷ The supreme court relied on *Elyria v. Vandermark*, 100 Ohio St. 365, 126 N.E. 314 (1919). That case held a statute void on the ground that it established a population classification of municipalities which violated art. XVIII, § 1.

²⁸ 83 Ohio App. 21, *appeal dismissed* 148 Ohio St. 670 (1947).

²⁹ 160 Ohio St. 328, 116 N.E.2d 580 (1953).

³⁰ 160 Ohio St. at 337, 116 N.E.2d at 586. Judge Taft again relied upon and "adopted" *Hugger* in *State ex rel. Leach v. Redick*, 168 Ohio St. 543, 157 N.E.2d 106 (1957).

The sale of real estate is a good example of professional and judicial confusion. A considerable line of cases has held municipal action void for non-compliance with statutory requirements. *Miller v. Brooksville*, 152 Ohio St. 217, 89 N.E.2d 85 (1949); *State ex rel. Manchester v. Shriver*, 113 Ohio St. 171, 148 N.E. 697 (1923); *Zielonka v. Carrel*, 103 Ohio St. 50, 132 N.E. 161 (1921); *Heck v. Jones*, 79 Ohio App. 549, 74 N.E.2d 644 (1946); *Merves v. Lorain*, 32 Ohio L. Abs. 417 (Ct. App. 1939). All of these, and especially *Miller* appear to be cases where the attorneys were unaware of art. XVIII, and the court didn't raise it. The cause is probably lack of research and

The interpretation of section 3 as of 1954 seemed clear: (1) While local police regulations were subject to statutory control under the conflict clause, the non-police powers were superior to conflicting state statutes unless state power was found in a specific constitutional provision; (2) Section 3 was self-executing and applied to all municipalities, charter or non-charter; (3) Since municipal power was derived directly from Section 3, the only significance of a charter in this respect was a) the ability to establish a form of government, and b) the ability to place limitations on section 3 powers by charter provision.³¹

However, the *Perrysburg* doctrine is also of great significance in charter interpretation. Can a charter city exercise a power of local self-government on a matter which the charter doesn't even cover?

If a charter were a prerequisite to the exercise of section 3 powers as per *Toledo v. Lynch*, it might reasonably be contended that it operates as a *grant* of power. It would then follow that if the charter was silent the city could *not* act. But if power is derived from section 3, it logically follows that a charter is a *limitation* of power. It would then follow that if a charter is silent on a matter which is within section 3 the city *can* act. Section 3 gives the power, the charter does not take it away, *ergo*, the city has power. To put it another way, as to a matter on which the charter is silent, a charter city is logically in the exact same position as a non-charter municipality.

Pursuing this line of thought the first case directly dealing with it is that of *State ex rel. Thomas v. Semple*.³² Cleveland wished to pay dues to a municipal association. In a per curiam opinion, without any syllabus, the court held the expenditure unlawful. There was some talk of a lack of public purpose. However, the opinion stated:

Without considering the validity of such a provision, it must be conceded that there is no express provision of the charter of the city of Cleveland relative to the contribution from the treasury of the city to a fund made up of contributions of various municipalities for the purposes enumerated in the constitution of the 'Conference of Ohio Municipalities,' and no general provision from which authority may be inferred to expend the funds of the city to assist in creating and maintaining an organization. . . .

the confusing statutory law of Ohio which, for the most part, is drafted and enacted with utter disdain for art. XVIII. These cases are over-ruled by implication under *Babin* and *Redick*—at least as to charter municipalities. As to non-charter, see the balance of this article.

³¹ There are other advantages to charter adoption which are not pertinent to this discussion. For example, municipal power over "non-local" matters is derived from state statutes, and a number of statutes distinguish between charter and non-charter municipalities. Art. XII, § 2 allows charter municipalities to escape the 10 mill tax limitation.

³² 112 Ohio St. 559, 148 N.E. 342 (1952).

The *Semple* case was decided after *Perrysburg* but in theory it was totally irreconcilable. If section 3 is the source of power, what difference did it make that the charter had no express or general provision?³³ But in 1951 the court cleared the whole matter up and overruled *Semple*. In *State ex rel. McClure v. Hagerman*,³⁴ Dayton, a charter city, authorized the payment of dues to a municipal association. Judge Middleton faced the public purpose and home rule questions head on. Having found a public purpose, he disposed of *Semple* as follows:

We do not undertake to distinguish the *Semple* case. In the last paragraph of the opinion in that case reference is made to the absence of express provision in the charter of the city of Cleveland relative to the contribution to the Conference of Ohio municipalities. Such absence of specific charter authority is not, in our judgment, controlling. Assuming that the charter of Cleveland contained no prohibition against the expenditure, the authority of the city to make it would be derived from the Constitution, just as we have said in the instant case that the authority of the Dayton commission is derived from the Constitution, provided the expenditure is one for a public purpose. So far as the decision in the *Semple* case is inconsistent with the conclusions herein stated that decision is hereby overruled.

CONSEQUENCES OF THE PERRYSBURG DOCTRINE

As the above review shows, from 1923 to 1953 the supreme court forged the *Perrysburg* doctrine link by link until it was a solid chain of logically consistent theory. During the same period, however, the court also developed devices to *evade* much of the impact of the doctrine. That, however, is another story.³⁵ But the doctrine *itself* was constantly strengthened. Ignoring for the moment the narrowness of its application, a brief appraisal of its legal consequences is needed.

The operation of section 3 under the *Perrysburg* doctrine makes a large quantity of the municipal code invalid. It is operative only as to (1) provisions on incorporation and form of government, (2) "police" power provisions and (3) grants of power to act in areas which are not matters of local self-government.³⁶ Within section 3,

³³ *Semple*-type thinking also appears in *State ex rel. Fairmount Center Co. v. Arnold*, 138 Ohio St. 259 at 262, 34 N.E.2d 777 (1941).

³⁴ 155 Ohio St. 320, 98 N.E.2d 835 (1951).

³⁵ The two principle devices were the concept of "state-wide concern," and an extremely broad interpretation of the meaning of "police regulations." On "non-local," see for example, *Village of Beachwood v. Board*, 167 Ohio St. 369, 148 N.E.2d 921 (1958). On "police regulations," see *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1948), and the discussion in 20 Ohio St. L.J. 152 (1959).

³⁶ The municipal code is Rev. Code c. 7. Again, art. XVIII § 13 should be considered. That section enables the General Assembly to control taxation and the

clause 1, a municipality has the same breadth of power as the state legislature previously had prior to 1912. Unless restricted by charter provision, a municipality could exercise that power just as the state legislature did, *i.e.*, merely by proper enactment of a law. As to non-charter municipalities, the local legislative body is entrusted with vast power—freed almost entirely of many safeguard provisions imposed on local government by statute, *i.e.*, requirements of notice, hearing, bidding, *etc.* The significance of this is apparent. While much of the state municipal code is open to heavy criticism, most of it also provides desirable safeguards for the public interest. Yet, the vast bulk of municipalities are non-charter.³⁷ Few small municipalities have adequate legal advice and are prone to follow the statutes.

Of course, there are several answers to this thesis. The municipal officials' power would be very broad but no broader than that of the General Assembly. They, too, are elected and responsible to their electorate. The electorate also has available the ability to impose stringent restrictions if they wish. The procedure for doing so is created in the constitution, is very simple, and requires only a majority of those voting.³⁸

MORRIS V. ROSEMAN³⁹

The first direct inroad upon section 3's interpretation came in the *Morris* case. Rev. Code section 713.12 requires a public hearing and 30-days' notice before the enactment of a zoning ordinance. Oakwood, a non-charter village, adopted a zoning ordinance as an emergency measure and without notice or hearing. The village did, of course, comply with the general requirements of the incorporation statutes for legislative action, *i.e.*, proper meeting, quorum, *etc.* In a 5 to 1 decision the court held the ordinance void. The syllabus reads:

1. Section 3, Article XVIII of the Constitution of Ohio, conferring 'home rule' power, *does not in and of itself* empower an Ohio noncharter municipality to enact an emergency zoning ordinance effective immediately; and such noncharter municipality, *in the enactment* of a zoning ordinance, must comply with the provisions of Section 4366-11, General Code (Section 713.12, Revised Code), which requires the holding of a public hearing on such

incurring of "debt." It should be noted that the statutes impose extensive fiscal controls the validity of which is somewhat dubious. The "Uniform Tax Levy Law" (Rev. Code c. 5705) rigidly controls the procedure and purposes of tax levies. The purpose limitations are probably all invalid. However, the area of fiscal controls has been little litigated. The court's generally pro-General Assembly attitude in municipal fiscal affairs makes a prediction of other possible distinctions very difficult.

³⁷ As of June, 1960, Ohio had 776 villages and 150 cities. Only 90 municipalities had "home-rule" charters under § 7 of art. XVIII.

³⁸ art. XVIII, §§ 8 and 9.

³⁹ 162 Ohio St. 447 (1954).

ordinance preceded by a 30-day notice of the time and place of such hearing.

2. An Ohio municipality which has not adopted a charter for its government, as authorized by Section 7, Article XVIII of the Constitution of Ohio, must, in the *passage* of its legislation, follow the *procedure* prescribed by the statutes enacted pursuant to the mandate of Section 2, Article XVIII of the Constitution. . . .⁴⁰

In the terse opinion, Judge Zimmerman first reaffirmed *Perrysburg*. Then he recognized that zoning was a section 3 power. Then the opinion states:

But how and in what manner is such power to be exercised?

The Constitution of Ohio provides two ways. By Section 2, Article XVIII, a mandatory duty is placed upon the General Assembly to enact laws for the incorporation and *government* of cities and villages, and Section 7, Article XVIII, grants a municipality the option of determining its own plan of local self-government by framing and adopting a charter. If a municipality adopts a charter, it thereby and thereunder has the power to enact and enforce ordinances relating to local affairs, but, if it does not, its organization and operation are regulated by the statutory provisions covering the subject.

In other words, by Sections 3 and 7 of Article XVIII of the Constitution, a municipality has the power to govern itself locally in certain respects. *The statutes in no way inhibit such power but merely prescribe an orderly method for the exercise* of such power where the municipality has not adopted a charter and set up its own governmental machinery thereunder. . . .⁴¹

Judge Zimmerman said at the start of his opinion that "we now revert to the question of whether a non-charter municipality possesses the power to effectively adopt an emergency zoning ordinance." He might have said that we now revert to the question of *Lynch* and *Perrysburg*.

The Attorney-General was so firmly committed to a pure *Perrysburg* doctrine⁴² that he simply dismissed *Morris* as a peculiar application of police regulation-conflict doctrines.⁴³

However, the court in both the syllabus and opinion relied on section 2. Further, there is no mention of the section 3 conflict clause. While zoning itself is clearly a police regulation nobody was contesting

⁴⁰ Emphasis added.

⁴¹ Emphasis added.

⁴² See for example 1950 O.A.G. No. 1478; 1946 O.A.G. No. 1371; 1945 O.A.G. No. 272; 1942 O.A.G. No. 5558.

⁴³ 1957 O.A.G. No. 787. Prior to 1958, the Court had stretched and re-stretched the meaning of "police regulations" to such an extent that this was not an unreasonable interpretation of *Morris*. See Note in 20 Ohio St. L.J. 152 (1959).

the content of the ordinance. The question was specifically on the *procedure* used in adoption. Finally, it is difficult to see how enactment procedure can possibly be classified as a "police regulation"—whether the end product be a police or a non-police ordinance.

Viewed as an original question (say in 1913) the *Morris* decision is certainly a reasonable interpretation of sections 2, 3, and 7. The word "government" in section 2 is quite capable of greater meaning than mere organizational form or structure as assigned to it by *Perrysburg*. In fact, Dean Fordham uses sections 2 and 7 to make a very persuasive argument that *Perrysburg* was all wrong and a charter should be required before home-rule powers can be exercised.⁴⁴ But *Morris* only goes halfway down that road—separating the abstract substantive power from the "method" or "manner" or "procedure" of exercising it.

However, the interpretation of section 2 was not an original question for the court. True, *Perrysburg* didn't discuss the interpretation of "government" in section 2 as such. But it did specifically discuss the word "government" in section 7 and Judge Zimmerman in *Morris* linked these two sections, assigning the same meaning to the word in both sections. *Perrysburg* did specifically overrule *Toledo v. Lynch*. *Lynch* did exhaustively discuss sections 2 and 7 in the majority opinion, the concurring opinion, and the dissenting opinion. It would hardly seem reasonable to distinguish *Perrysburg* and the entire line of cases developing that doctrine on the ground that they didn't consider section 2. Nor did the court in *Morris* attempt to distinguish earlier cases. The syllabus and the opinion merely state that a non-charter municipality must "follow the procedure prescribed by statutes enacted pursuant to the mandate of section 2." The court referred to only one case as possible authority for its decision—*State ex rel. Fairmont Center Co. v. Arnold*.⁴⁵ In *Arnold*, the charter city of Shaker Heights adopted a stop-gap zoning ordinance prohibiting building permits for construction which would violate any pending zoning change. The ordinance was adopted without the notice or hearing required by then General Code sections 4366-7 to 4366-11. However, General Code sections 4366-12 specifically *exempted* charter cities from the operation of the statutes and the court had so held.⁴⁶ Thus, it was obvious that if the charter established a procedure and council followed the charter, its action would be valid under any analysis. However, the court held that *the charter adopted* state law and that the council *was acting under the statutes* when it passed the

⁴⁴ Fordham and Asher, "Home-Rule Power," 9 Ohio St. L.J. at 20-24 (1948).

⁴⁵ 138 Ohio St. 259, 34 N.E.2d 777 (1941).

⁴⁶ *Bauman v. State ex rel. Underwood*, 122 Ohio St. 269, 171 N.E. 336 (1930).

ordinances.⁴⁷ Having failed to comply with the statutory procedure, the ordinance was void.

In *Arnold*, the statutes applied *because* of the charter incorporation of state law. The efficacy of the statute as law was derived from the charter and article XVIII, *not* from any power of the General Assembly. As an authority on the applicability of statutes to municipalities, *Arnold* is almost the exact *opposite* of the principle of *Morris*!⁴⁸

Even though *Morris* made no attempt to explain how its conclusion was reached, the implication of the decision seemed clear. Since *Perrysburg* was specifically re-affirmed; since both the opinion and syllabus of *Morris* are specifically confined to the "procedure" or "method" of enacting legislation; and since it held that the "statutes in no way inhibit" home-rule powers granted by section 3; then a non-charter municipality must still derive its *substantive* powers directly from section 3. A statute, which was based on the general powers of the state, and which interfered with home-rule power would still be void. Only the procedure for exercising the substantive power would be controlled by statute, *i.e.*, the procedure for the enactment of an ordinance.

Of course, that leaves the nasty question of what is "procedure" and what is "substantive." Apparently, the hearing and 30-day notice required by Rev. Code § 713.12 are to be considered procedure. In the sale of real estate, Rev. Code § 721.03 requires a two-thirds vote of council. Is that "procedure" or is that a void attempt to interfere with local self-government by a partial restriction on the power to sell land? The statute also requires advertisement, bids, and the sale to the highest bidder. Is that "procedure"? Would the court consider a statute "procedural" if it required private individuals to sell their homes at auction to the highest bidder?⁴⁹

Obviously, in this field of law the "procedure—substantive"

⁴⁷ The court's interpretation of the Charter as adopting state statutes is very dubious. Many charters give council the option of following state statutes if they *wish*. The fact that they *failed* to do so would seem immaterial if the procedure followed does not violate a charter provision. The Shaker Heights Charter appears to have been of this type.

⁴⁸ The *Arnold* case also found the ordinance to be an unconstitutionally retroactive law. The "home-rule" discussion would thus appear to be dictum in any event.

⁴⁹ It is interesting to speculate on what would happen to the *Hugger* case under a *Morris* analysis. Each of the requirements for the sale of land found in Rev. Code § 721.03 can reasonably be classified as "substantive." If so, *Hugger* and the Attorney-General's opinion are both still correct in their result, but for a different reason.

A probable example of a non-procedural statute under *Morris* is Rev. Code § 717.01. It limits municipal power to condemn utility property by requiring the relocation or duplication of utility facilities.

distinction totally lacks mental content. It can be defined only by reference to specific matters. The *Morris* case validated a great deal of the municipal code, but only extensive litigation could determine which parts of it. If the court was unhappy with the *Perrysburg* doctrine's development, it would seem better to have adopted Dean Fordham's analysis completely and simply overruled it—better, that is, for the court's work load, and better for attorneys who must advise on the law.

The problem of *Lynch*, *Perrysburg*, and *Morris* is an essentially political one—should safeguards against abuse of power by local officials be a responsibility of the municipalities' electorate or the General Assembly? The decision in *Morris* appears to leave the court without a clear answer to that problem and creates a new one where its only yardstick is "procedural v. substantive." That distinction is an even more elusive one than the distinction between "proprietary" and "governmental" activities in the fields of municipal tort and tax liability.

MORRIS AND CHARTER MUNICIPALITIES

As noted previously, the *Perrysburg* Doctrine was carried forward in *McClure* to the logical conclusion that a charter is not a *source* of home-rule power, but a *limitation*. Thus, if a charter is silent, *McClure* held the city derived power to act from section 3. The *Morris* case suggests a qualification on that concept.

Under *Morris* the procedure for enacting an ordinance is a matter of "government" under section 2 and not a matter of "local self-government" under section 3. Therefore, a charter municipality's power to establish its own enactment procedure would logically be derived from section 7—the power to adopt "a charter for its government." The opinion in *Morris* appears to so state, although on its facts that is clearly not a holding. On this approach, the charter does act as a *grant* with respect to enactment procedure, and as a *limitation* with respect to section 3 "substantive" powers.

This analysis raises points that anyone drafting or interpreting a charter must consider. If enactment procedure is controlled by sections 2 and 7, it logically follows that if a charter is silent (or perhaps not sufficiently specific) on procedure, section 2 applies and the city must follow state law. Thus it would appear that every charter should contain a boiler-plate on procedure. The simplest would be to provide that unless otherwise prescribed in the charter the only procedure necessary is the regular passage of an ordinance. In light of the *Arnold* case, provisions "allowing" council to follow state law are highly dangerous.⁵⁰

⁵⁰ See note 47, *supra*.

STATE EX REL. PETIT V. WAGNER⁵¹

An even deeper inroad on the *Perrysburg* doctrine may have been made in the recent *Petit* case.

The position of municipal civil service regulations had for a considerable period of time been in a state of confusion. One series of cases, starting at a very early date, held civil service to be a matter of local self-government within section 3.⁵² However, as to policemen and firemen another later series of cases classified administrative regulations either as "police" regulations controlled by the conflict clause of section 3 or as a matter of "statewide concern," apparently not even within the home-rule amendment.⁵³ In the 1950's another series of cases began to make inroads on the police and firemen cases.⁵⁴ These cases culminated in *State ex rel. Canada v. Phillips*.⁵⁵ In *Canada* the court overruled or distinguished the 1940 cases and returned to the earlier position that civil service, including that for policemen and firemen, was a home-rule matter.⁵⁶

All four of the cases decided in the 1950's involved charter cities. The first two, *Lapolla* and *Harsney*, deal with the power of the Chief of Police. In *Lapolla*, the court's reasoning can be summarized as follows: The Youngstown charter placed sole direction of the police department in the mayor; therefore, in Youngstown, the Chief of Police did not hold a public office, but rather was an employee; that

⁵¹ 170 Ohio St. 297, 164 N.E.2d 574 (1960).

⁵² See *Hile v. Cleveland*, 118 Ohio St. 99, 160 N.E. 621 (1928); *State ex rel. Vogt v. Donahey*, 103 Ohio St. 440, 140 N.E. 609 (1923); *State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 107 N.E. 768 (1914).

⁵³ See *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 53 N.E.2d 501 (1944); *Daly v. Toledo*, 142 Ohio St. 123, 50 N.E.2d 338 (1944); *Cincinnati v. Gamble*, 138 Ohio St. 220, 34 N.E.2d 226 (1941); *In re Fortune*, 138 Ohio St. 385, 34 N.E.2d 442 (1941); *State ex rel. O'Driscoll v. Cull*, 138 Ohio St. 516, 37 N.E.2d 49 (1941); *State ex rel. Strain v. Houston*, 138 Ohio St. 203, 34 N.E.2d 219 (1941).

⁵⁴ See *State ex rel. Lynch v. Cleveland*, 164 Ohio St. 437, 132 N.E.2d 118 (1956); *Harsney v. Allen*, 160 Ohio St. 36, 113 N.E.2d 86 (1953); *Lapolla v. Davis*, 55 Ohio L. Abs. 490, 89 N.E.2d 706, *motion to certify denied*, 151 Ohio St. 550, 86 N.E.2d 615 (1949). The 1940 series did not distinguish, overrule nor cite the earlier cases. The 1950 series did not distinguish, overrule nor, for the most part, cite the 1940 series.

⁵⁵ 168 Ohio St. 191, 151 N.E.2d 722 (1958).

⁵⁶ The court also disposed of art. XV, § 10. That provision deals with civil service of the state, counties and cities. It does not use the word "villages." The last portion provides that "laws shall be passed providing for the enforcement of this section." *Canada* held that by this provision the General Assembly obtains power to enact civil service laws for cities, but that a city's power over civil service comes from art. XVIII and would control. Thus, in effect, the two have concurrent jurisdiction over civil service, with supremacy in the cities. But General Assembly power over civil service of villages can not be based on art. XV, § 10. Logically therefore, any state civil service statutes for a *charter village* are simply void. As to non-charter municipalities, city or village, an analysis has to start with the *Perrysburg* doctrine.

as an employee, his civil service status was to be determined under the charter. This strongly suggests, and the opinion shows, that the court relied in part on section 7 and the power to establish a structure of "government," creating what offices it wished and distributing or allocating power to those offices as it wished. Similarly in *Harsney*, the Youngstown charter placed the power to station and transfer patrolmen in the "Chief of Police." The statute placed the ultimate power in the "director of public safety." The charter did not provide for any such office. The court upheld: (1) the Chief's power to transfer a patrolman and (2) the transfer as made. The first point again seems clearly a section 7 power of a charter city to establish offices and distribute power. The second is a civil service matter and based on section 3. Again in *Harsney*, the court cited and relied upon both sections.

In *Lynch*, the supreme court was concerned with the qualifications and mode of selection for the Cleveland Police Chief. The qualification and mode of selecting a person for municipal office would seem reasonably classified as an integral part of establishing the structure of government, and therefore controlled by section 2 for non-charter cities and section 7 for charter municipalities. Thus if the Cleveland Chief held an office under the charter, it would seem that the proper analysis would be to uphold the city law under section 7. If the Chief was an employee, then it was a civil service problem controlled by article XV, section 10 and article XVIII, section 3. Interestingly enough, the syllabus of *Lynch v. Cleveland* cites only section 3, although the opinion cites and relies on section 7, too.

Canada dealt with the selection of a deputy inspector of police in Columbus. The syllabus and opinion cite and rely on sections 3 and 7—one might almost say that they carefully cite both sections of the constitution.

Between the Cleveland and Columbus cases, the court decided *State ex rel. Bindas v. Andrish*.⁵⁷ The court upheld the power of a charter city to establish qualifications for councilmen which differed from statutory requirements. Again both sections 3 and 7 were used.

Obviously in the case of charter municipalities it was unnecessary for the court to distinguish between reliance on section 3 and section 7. Either way the charter municipality will win. But under *Perrysburg*, the distinction would be vital. If these four cases were based on section 3 "local self-government," non-charter municipalities apparently would also be able to escape state statutes. But if, and to the extent that these cases are based on section 7, only a charter municipality would have power—and would have to exercise it by

⁵⁷ 165 Ohio St. 441, 136 N.E.2d 43 (1956).

charter provision. Thus a sections 2 and 7 analysis provides a ready tool to slice away some more of the impact of the *Perrysburg* doctrine, and *Morris* had certainly lighted the path.

Inevitably a non-charter municipality changed the qualification for its Chief of Police, and the precise question of its power arose in *State ex rel. Petit v. Wagner*.⁵⁸

Under Rev. Code section 143.34, as interpreted by the court, the position of chief of police had to be filled by a promotion within the department. North College Hill, a non-charter city, passed an ordinance allowing selection of an "outsider." In an unanimous opinion the court held the ordinance void. The syllabus is rather innocuous and does not reveal anything of the basis for the result. It merely states:

A noncharter municipality is without authority under the provisions of Section 3, Article XVIII, Constitution, to prescribe by ordinance a method for the selection of a chief of police which is at variance with the provisions of Section 143.34, Revised Code.

The opinion utilizes a section 2 and 7 analysis to justify the result, but with a most unexpected twist! Judge Peck starts by stating that the city claimed a right under home-rule to adopt regulations on police personnel which are at "variance" with statutory law. The opinion then reaffirms that section 3 applies "with equal force" to *all* municipalities. At this point the opinion states:

The case of *Village of Perrysburg v. Ridgway, a Taxpayer*, 108 Ohio St., 245, 140 N. E., 595, establishes the right of a municipality to exercise certain powers of home rule in the absence of a charter, *but there the powers of home rule sought to be exercised were not at variance with the general law*. However, although it is always of limited persuasion to seek guidance in a case which has decided part of the whole, the circumstances of the *Perrysburg* decision particularly cast doubt on the validity of arguing it as authority for an extension of its own doctrine. In that case, three of the judges of this court dissented, and two of the four judges concurring in the majority opinion joined in a concurring opinion specifically reserving "for future determination" the situation in which the municipal enactment and the general law might be at variance. Thus, far from being authority for the proposition that a non-charter municipality can adopt regulations at variance with general law, it is actually a case in which five of the seven members of the court either adopted a diametrically opposite position or explicitly emphasized the fact that they were not passing upon it. This limitation of the *Perrysburg* decision is pointed up in *City of Cleveland v. Public Utilities Commission*, 130 Ohio St., 503, 200 N.E. 765.⁵⁹

⁵⁸ 170 Ohio St. 297, 164 N.E.2d 574 (1960).

⁵⁹ 170 Ohio St. at 300, 164 N.E.2d 576. Emphasis by the court.

This is obviously a direct attack on *Perrysburg* and not an "end run" as in *Morris*. It is true, of course, that there was no conflict or "variance" in *Perrysburg*. But, on the point of conflict with state law, North College Hill would seem rather clearly to be relying on the *Fitzgerald* doctrine, *i.e.*, that clause 1 powers are not subject to the "conflict" clause of section 3. It is also true that three judges dissented in *Perrysburg*. But the dissent was on the ground that the *Perrysburg* bus regulation was not the matter of local self-government. The dissent in no way can be construed as rejecting the majority interpretation of section 3, nor of rejecting the application of the *Fitzgerald* doctrine to non-charter municipalities. The dissenting opinion specifically stated that the powers of a non-charter municipality are irrelevant under its view of the case. It is also true that the concurring opinion of *Perrysburg* reserved for future determination the question of a "variance." As previously noted, the *Perrysburg* ordinance seems quite obviously to be a police regulation subject to the conflict clause. All seven of the judges in *Perrysburg* joined in the *Struthers* and *Youngstown* cases involving police regulations of non-charter municipalities.

Judge Peck is swinging rather far afield in describing the dissent in *Perrysburg* as adopting "a diametrically opposite position" and in describing the concurring opinion as "not passing on it"—at least if by "it" is meant the interpretation of section 3. Nor is the court's citation of the *Public Utilities Commission* case of any help. That case involved a P.U.C. order concerning a bus terminus on a line traversing four municipalities. The court upheld the order against the protest of a charter city. The opinion did not discuss *Perrysburg* except to note that a statute was passed after *Perrysburg* giving the P.U.C. jurisdiction of transportation lines. Finally, the regulation of bus lines and terminals would seem clearly a police regulation subject to state control under section 3.

The *Petit* opinion then continues by reaffirming that the conflict clause of section 3 limits only local police regulations. It then states:

Indeed, any other interpretation of Section 3 would render the adoption of Section 7 senseless, because its grant of authority for municipal charter operation is specifically 'subject to the provisions of Section 3.' If full home-rule authority were intended to have been created by Section 3, the adoption of Section 7 could only be considered as a vain and superfluous act. Such a conclusion would be completely lacking in justification, and was expressly denied in the *Canada case*, *supra*.

The principle point under consideration in this quotation was the interpretation of the conflict clause in section 3, *i.e.*, a re-affirmance of the *Fitzgerald* doctrine. The statements on the legal effect of section

7 and the suggestion that section 3 does not grant "full" home-rule power are something else.

As previously noted, the *Perrysburg* doctrine was originally open to serious doubt. However, the claim that an interpretation of section 3 as a grant of "full" power to all municipalities is to make section 7 "a vain and superfluous act" is a rather shallow statement. It is hardly "vain or superfluous" to grant power to establish a form of government and provide restrictions on the exercise of home-rule powers.

The wording in the quotation suggests not only that section 3 did not create "full" home-rule power, but that *Canada* expressly denied such an interpretation. The *Canada* case re-affirmed *Fitzgerald*. With respect to non-charter municipalities, *Canada* is relevant only by implying either (1) that by virtue of the *Perrysburg* doctrine they can establish qualifications for inspectors of police, and therefore the opposite of the result in *Petit*; or (2) that the qualifications are to be classified as a part of structure of "government" controlled by sections 2 and 7 and therefore consistent with the result in *Petit*. But by no stretch can *Canada* be cited as authority that section 3, clause 1, did not grant "full" power of local self-government.

The opinion next dismisses earlier *Perrysburg* authority with the observation that all the cases concerned charter municipalities "and thus presented a different problem." No mention is made of *Mansfield*, *Hugger*, *McClure* or the many Attorney-General opinions.

Judge Peck's problem is thus reduced to explaining how it is that a non-charter municipality which has enacted a non-police regulation, can have power to exercise the other powers of "local self-government" which admittedly are not controlled by the conflict clause, and yet be subject to a state statute. The obvious answer would be to classify the matter as part of the structure of government or as a "procedural" requirement under *Morris*. However, the opinion creates an entirely new theory which is far broader than those. The opinion states:

Section 3 confers upon all municipalities 'authority to exercise all powers of local self-government' but, as pointed out in *Morris v. Roseman*, *supra*, does not state 'how and in which manner' such powers are to be exercised. Section 2 specifically authorizes 'general laws . . . to provide for the . . . government of' municipalities. It is apparent therefore that, by what they said, the people expressed an intention that, in the absence of the adoption of a charter pursuant to Section 7 or of the adoption of any 'additional laws . . . for the government of municipalities adopting the same' pursuant to Section 2, the 'general laws . . . for the . . . government of' municipalities authorized by Section 2 were to control a municipality in the exercise of the powers of local self-government conferred upon it by Section 3. Where a charter is adopted, then,

under Section 7, the municipality 'may, subject to the provisions [*i.e.*, limitations] of Section 3 [not Section 2 and 3] . . . exercise thereunder [*i.e.*, under the charter instead of under general laws] all powers of local self-government.' The only limiting provision then applicable is that specified in Section 3, that 'local police, sanitary and other similar regulations' shall 'not . . . conflict with general laws.' (Paragraph four of syllabus of *State, ex rel. Canada, v. Phillips, supra.*)

If this *opinion* is the law we have now come 359 and $\frac{1}{2}$ degrees around to 1913 and *State ex rel. Lynch v. Toledo*—a charter is a prerequisite. The cruelest cut to "home-rule enthusiasts" is the next portion of the opinion:

This court has thus *clearly* recognized the *distinction* between the powers of charter and non-charter municipalities. *Clear* evidence of the intention that such a distinction should exist is found in the very fact that the two provisions of the Constitution hereinabove cited were adopted as separate sections; if an identical extent of authority had been intended to have been conferred, a single section would have abundantly sufficed. By these two sections, the Constitution confers upon charter cities and villages *some greater degree of power* not here required to be defined but limits the general area of non-charter municipal authority. There is in the present case a direct variance between the statute permitting only members of a police department to take an examination of the type here under consideration and the ordinance which contains no such limitation, and it is our conclusion that such variance renders the ordinance invalid. Differently stated, a non-charter municipality is without authority under the provisions of Section 3, Article XVIII of the Constitution, to prescribe less restrictive qualifications for civil-service-examination applicants than are prescribed by statute, since such municipal action would be at variance with the general law.⁶⁰

Obviously, the *Petit* analysis of *Morris* is a twisting of both the syllabus and opinion of that case. In fact, it is a paraphrase of the argument in the 1913 *Lynch* case rather than anything resembling the "procedure" analysis of *Morris*.

There is yet that $\frac{1}{2}$ degree to go. *Petit* seems to recognize clearly the power of non-charter municipalities to exercise "all powers of local self-government" where they don't conflict with statutory law. Perhaps it would be better to use the word "variance" created by the court and thereby avoid confusion with the concept of "conflict" in police regulations. However, since the municipal code of 1902 is still essentially on the books and since the General Assembly has for 47 years continued enacting extensive amendments using the same drafting technique, this new "variance" concept will provide little comfort to the "home rule enthusiasts."

⁶⁰ Emphasis added.

The fate of the *McClure* doctrine seems somewhat up in the air. Whether a charter is a limitation or a grant is a question of considerable importance in charter drafting and in charter interpretation. Under the "variance" concept of *Petit*, charter municipalities "have some greater degree of power" over matters of local self-government that non-charter municipalities do not have. This greater power stems from section 7 and *apparently*, therefore, from the charter.

The "variance" concept cannot be justified on either *stare decisis* nor on a logical extension of an existing body of legal theory. It is simply inconsistent with a synthesis of earlier case law. If accepted as a part of home-rule law, it will have serious retroactive implications. The *Perrysburg* doctrine has been used as the basis for advising non-charter municipalities. In the particular area of *Petit*, qualification for municipal employment and civil service, the *de facto* doctrines will mitigate its effect. But in other areas, particularly property law, the implications are difficult to assess. As *Hugger* and the Opinions of the Attorney-General show, there are apparently numerous instances of non-charter municipalities disposing of real estate without complying with the statutes. The "variance" concept would certainly seem to create a cloud on title,⁶¹ opening these transfers to taxpayer's suits.

Of course, a "procedure" and structure analysis of sections 2 and 7 is still available to the Court as a means of limiting *Petit* and restoring a portion of vitality to the *Perrysburg* doctrine. In view of the judicial history of section 3, it is not impossible to believe that the reasoning of *Petit* might be rejected and the result retained. Here the Ohio syllabus rule might be very handy. If the case is considered on its facts alone, then much of the reasoning becomes unnecessary.⁶² Certainly that seems the logical strategy of argument for a municipal attorney. However, attempts at "end runs" in home-rule have sometimes been very unsuccessful. The strategy backfired badly in the tax field. Perhaps home-rule enthusiasts, therefore, should attack the *Petit* reasoning head-on.

JURISPRUDENCE

In appraising the development of article XVIII, section 3, it would be equally profitable to explore several other areas. The *Fitz-*

⁶¹ The Supreme Court of Ohio apparently will not use the device of "prospective overruling." It failed to use it in an almost ideal situation. *Rush v. Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599 (1958). See Note, 19 Ohio St. L.J. 477 (1958).

⁶² One delicate problem is to gauge the effect of *Petit* upon the interpretation of the municipal utility sections of art. XVIII. The court has followed a "Fitzgerald-Perrysburg" type of reasoning in that field. However, §§ 4, 5 and 6 each start with the words "Any municipality. . . ." This provides a ready means of distinguishing them from § 3.

gerald doctrine has received a pretty severe buffeting over the years.⁶³ The interpretation of the scope of "police" regulations had very nearly reached a point of utter confusion until rescued by the *Canada* case.⁶⁴ And in defining and applying the concept of "conflict" with state law, it may be doubted that we have ever reached anything "remotely resembling consistency."⁶⁵

⁶³ One device for limiting the impact of the *Fitzgerald* doctrine is the concept of "state-wide concern." A clear example of its use can be found in *Cincinnati v. Gamble*, 138 Ohio St. 220, 34 N.E.2d 226 (1941). Obviously the basic legislative power is vested in the General Assembly by art. II, § 1. Likewise it would seem apparent that not all governmental matters which may arise within the territorial limits of a municipality can be classified as "local self-government." For example, the condemnation of land and erection of a building for a state or county agency; the location of a state highway; the establishment and operations of a health district by the State, etc. See *Lakewood v. Thormeyer*, 171 Ohio St. 135 (1960). A convenient, if dangerous, way of distinguishing these matters from "local" ones is to refer to them as being of "state-wide concern." Logically, any such matter is entirely outside the operation of art. XVIII, and the municipality's power to act, if at all, must be derived from a statutory grant, just as its power to act outside its limits (except in the field of utilities) must rest on statutory authorization. See *Fordham and Asher*, "Home Rule Power," 9 Ohio St. L.J. 18, 33 (1948). Thus, Ohio municipalities hold a dual position and derive power from two sources, the constitution and statutes. The "gimmick" is in the *application*. Many, if not most, matters are of some interest to both state and local government. Unless carefully refined distinctions are made, the label of "state-wide concern" can effectively throw municipal action right back into the common law concept and Judge Dillon's thesis.

Gamble even states that the General Assembly can *impose* duties on municipalities to act as arms or agencies of the State. However, in *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1948) the court specifically questioned that proposition. It would seem especially doubtful if the State attempted to foist upon a municipality the financial cost of supporting a state agency which is established within its limits.

⁶⁴ A broad definition of "police regulations" was another device to avoid the *Fitzgerald* doctrine. For example, in *State ex rel. O'Driscoll v. Cull*, 138 Ohio St. 516, 37 N.E.2d 49 (1941), the court held a civil service education requirement to be a "police" regulation, and void for "conflict" with state law. The case was overruled by *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1948). The furthest reach was probably attained in *Hagerman v. Dayton*, 147 Ohio St. 313, 71 N.E.2d 246 (1947), which stated that a provision for voluntary check-off of union dues was a "police" regulation in "conflict" with general laws. However, the broad statements in *Hagerman* are clearly dictum. See the excellent review of the definition of "police" power in 20 Ohio St. L.J. 152 (1959).

⁶⁵ The development of the "conflict" concept is a very complex subject. The two major trouble areas are statutory interpretation, and the question of prohibitions. With respect to interpretation, if the court does not require specific, affirmative state action and goes beyond the explicit provisions, or *necessary* implications of a statute, local action will frequently be in "conflict." Suppose a statute making it unlawful to exceed 25 MPH, and an ordinance setting it at 15 MPH. It is *reasonable* to imply that the statute *permits* speeds less than 25 MPH. However, in the *absence* of any statute it would also be lawful to go less than 25 MPH. Therefore it is not a *necessary* implica-

Non-charter municipal power, and the other three areas just mentioned, have a close causal relationship to each other. The Constitutional Convention of 1912 did not itself provide a solution to the basic problem of delineating the power of the General Assembly and those of the municipalities. By using the almost meaningless phrase "local self-government,"⁶⁶ that deeply political question was thrown to the supreme court. Nor did the Convention adequately answer the question of who was to assume responsibility for imposing controls on the exercise of power by local officials. We have learned, as we should have expected, that the mantle of the judiciary does not make political questions any less controversial or any less difficult of solution.

Yet, even though controversial and difficult, why is it that stare decisis did not provide us with at least certainty in results?

The allure of absolute local autonomy seems to have faded with the fading memory of pre-1912 conditions. It almost faded from sight in the 1940's in that series of cases found in volume 138 of the Ohio State Reports. It would seem more than coincidence that the tide of local autonomy ran strongly from 1913 to the middle 1930's; that the shift toward state power reached its high point in decisions of the middle 1940's; and that the movement toward a middle road began in the late 1940's and continued through the 1950's. It takes no historian or sociologist to identify an initial concern with legislative irresponsibility, the depression and war era, and the rise of new municipal problems in the post-war period.

But to explain these major shifts in judicial attitude, it is not necessary to develop a thesis on how courts "follow the election returns." The *Fitzgerald* doctrine itself could account for the obvious lack of consistency in the court's underlying attitude toward home-rule. That doctrine placed the court in a particularly awkward position.

First, by using the broad phrase "local self-government," the

tion from the *negative* statute that lesser speeds were permitted. It can not be said that the *statute*, as opposed to common law, permits a lesser speed. Thus the ordinance, which can change common law, should not be held in "conflict." However, compare *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929).

Mere prohibitions are, as such, considered ineffective to create a conflict. See for example *City of Fremont v. Keating*, 961 Ohio St. 468, 118 N.E. 114 (1917). But prohibitions have been used in interpreting statutes to draw broad implications of legislative intent. Again compare *Schneiderman*. A more sophisticated form of prohibition arises if the court adopts a "pre-emption" theory. Hints of such an approach can be found. See *Stary v. Brooklin*, 162 Ohio St. 120, 121 N.E.2d 11 (1954). An excellent example of full blown "pre-emption" is *Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942).

⁶⁶ This phrase was hopefully substituted for the California constitution phrase "municipal affairs."

Convention foisted upon the court the primary responsibility of determining the division of governmental power. In adopting the *Fitzgerald doctrine*, the court assumed the *sole* responsibility of dealing with a substantial and important segment of that problem. It could not let the correction of any "mistakes" fall on legislative action. When a matter is declared to be a home-rule, non-police power, it is *constitutionally* placed beyond the general grant of legislative power to the General Assembly. A depression, a war era, and a post-war expansion bring changes in beliefs on what is desirable, even necessary, areas for state action. It is perhaps natural then to find the court, on the one hand, being chary of what is included in "local self-government" and, on the other hand, being astute in developing concepts which avoid or narrow the impact of the doctrine.

Second, the doctrine accentuated the problem of providing acceptable controls over the actions of local officials. In matters of structure of government, police regulations, taxation, debt, and now perhaps civil service, the local officials are subject to either state statutes or local control imposed by the adoption of a charter. However, *Fitzgerald* and *Perrysburg*, taken together, meant that in the general area of "local self-government," the officials of more than 90% of our municipalities would not be subject to either of those controls.⁶⁷

True, these officials would have no greater power within that area than the General Assembly formerly had, and still has within the present scope of article II. True, the municipal electorate could readily impose a charter. But the parentalistic common-law concept of statutory control is deeply imbedded in the legal mind. Had a case directly presented the problem in the 1920's, it seems apparent that those arguments would have prevailed. However, except in *Hugger*, the full implications of the doctrines did not reach the supreme court until *Morris* in 1954, and *Petit* in 1960. By then the court apparently was no longer prepared to accept the concept of "full home-rule power" in non-charter municipalities.

Article XVIII has provided considerable local autonomy, especially for charter municipalities. The only glaringly bad spot is in taxation, debt and fiscal controls generally. It seems probable, however, that the entire operation of the article will one day be drastically revised in a belated rush to solve metropolitan problems. Our experience can, and should, provide us with the basis to do a better job.

⁶⁷ In June 1960, only 90 of 926 municipalities had adopted charters.